

A David Kuok Khoon Hin v Kuok Khoon Hwong

B HIGH COURT (KUALA LUMPUR) — SUIT NO S-22-69 OF 2011
PRASAD ABRAHAM JC
19 MAY 2011

C *Tort — Defamation — Libel — Plaintiff claimed letter written by defendant and addressed to liquidator's representative ('impugned letter') defamatory of plaintiff — Whether impugned letter made reference to plaintiff — Whether there was publication of impugned letter — Whether impugned letter read as a whole was defamatory — Defences — Absolute privilege — Whether impugned letter part of quasi judicial proceedings — Qualified privilege — Whether proven — Whether defendant had moral duty to bring irregularities to attention of liquidators — Damages — Assessment of*

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E The plaintiff and defendant are brothers and part of the notable Kuok family. The intense rivalry and mistrust between the brothers exploded into a series of legal proceedings that eventually led to the defendant's removal as director of the Thien Ik Group of Companies ('the group of companies') that were owned by the family. After he ceased to be the director of the group of companies, the defendant used his nominee company to petition for the winding up of the group of companies on just and equitable grounds. The plaintiff and other contributories opposed the winding up but the court ordered the winding up of the group of companies. The winding up court then appointed liquidators to investigate the affairs of these companies. The defendant wrote a letter to the agent/representative of the liquidator, alleging that the plaintiff had abused his powers while exercising his executive powers over the group of companies ('the impugned letter'). The plaintiff filed an action for defamation against the defendant on the grounds that the impugned letter was defamatory in nature. In his defence the defendant contended that the impugned letter was not defamatory but protected by absolute privilege because it was written in the course of judicial proceedings. The defendant further pleaded qualified privilege in that as a contributory or shareholder of the group of companies he was under a legal or moral duty to point out the irregularities in the management of the group of companies.

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I **Held**, allowing the plaintiff's claim with damages and costs:

- (1) It was abundantly clear that the whole body of the impugned letter referred to the plaintiff. The impugned letter, which was in the defendant's own handwriting, was handed by hand to the liquidator's representative. This court could draw a reasonable inference that there

was publication of the impugned letter because of the method of communication used by the defendant. Based on the language of the impugned letter it was also clear that the defendant had alleged that the plaintiff had abused his powers while exercising executive powers over the group of companies. As such, the impugned letter was on the face of it defamatory in nature (see paras 5–6).

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- (2) The impugned letter did not set out the provisions of the Companies Act 1965 ('the Act') under which the liquidators could act on the impugned letter. Further, the matters raised in the impugned letter had been dealt with by the court or the liquidators in their reports. In any case, even if the liquidators were to agree with the complaints raised by the defendant they would have to move the court under the Act and not make orders until a decision or finding was made. This court thus found that the impugned letter was not a part of quasi judicial proceedings that attracted absolute privilege (see paras 7 & 9).

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- (3) There was no provision under the Act for the defendant to have written the impugned letter and then claimed qualified privilege as none existed. Further, the defendant had no moral duty to bring matters to the attention of the liquidators by way of the impugned letter (see para 9).

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- (4) After taking into account the nature of the defamation and the sting of the impugned letter, which had in the main been mitigated by the failure of the defendant in all his applications against the liquidator and the companies, this court awarded the plaintiff general compensatory damages of RM70,000, general damages of RM50,000 and aggravated damages of RM20,000 with costs (see paras 11–12).

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[Bahasa Malaysia summary]

Plaintif dan defendan merupakan dua orang adik beradik lelaki dan sebahagian daripada keluarga Kuok yang terkenal. Persaingan dan ketidakpercayaan yang serius antara adik beradik tersebut menjurus kepada satu siri prosiding undang-undang yang kemudiannya menyebabkan pemecatan defendan sebagai pengarah Kumpulan Syarikat Thien Ik ('kumpulan syarikat tersebut') yang dimiliki oleh keluarga tersebut. Apabila dia bukan lagi pengarah kumpulan syarikat tersebut, defendan menggunakan syarikat penamanya untuk memasukkan petisyen penggulungan kumpulan syarikat tersebut atas alasan adil dan berekuiti. Plaintif dan penyumbang-penyumbang lain membantah penggulungan tersebut tetapi mahkamah memerintahkan penggulungan kumpulan syarikat tersebut. Mahkamah penggulungan kemudian melantik pelikuidasi untuk menyiasat urusan syarikat-syarikat ini. Defendan menulis sepucuk surat kepada agen/wakil pelikuidasi, mendakwa bahawa plaintif telah menyalahgunakan kuasanya semasa melaksanakan kuasa ekskutifnya terhadap kumpulan syarikat tersebut ('surat yang dipersoalkan'). Plaintif memfailkan tindakan bagi fitnah terhadap defendan atas alasan

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- A bahawa surat yang dipersoalkan adalah berunsur fitnah. Dalam pembelaannya, defendan menghujahkan bahawa surat yang dipersoalkan bukan memfitnah tetapi dilindungi oleh keistimewaan mutlak kerana ia ditulis semasa dalam perjalanan prosiding kehakiman. Defendan selanjutnya memplidkan keistimewaan bersyarat di mana sebagai penyumbang atau pemegang amanah
- B kumpulan syarikat tersebut dia mempunyai kewajipan dari segi undang-undang dan moral untuk mengetengahkan salah laku dalam pentadbiran kumpulan syarikat tersebut.

Diputuskan, membenarkan tuntutan plaintif dengan ganti rugi dan kos:

- C (1) Adalah amat jelas bahawa keseluruhan isi surat yang dipersoalkan merujuk kepada plaintif. Surat yang dipersoalkan tersebut, yang dalam tulisan tangan defendan sendiri, diserahkan melalui tangan kepada wakil pelikuidasi. Mahkamah ini boleh membuat inferens yang munasabah
- D bahawa terdapat penerbitan surat yang dipersoalkan kerana cara komunikasi yang digunakan oleh defendan. Berdasarkan kepada bahasa di dalam surat yang dipersoalkan adalah juga jelas bahawa defendan telah mendakwa plaintif menyalahgunakan kuasanya semasa melaksanakan kuasa eksekutifnya terhadap kumpulan syarikat tersebut. Dengan itu, surat yang dipersoalkan adalah jelas bersifat memfitnah (lihat perenggan 5–6).
- E (2) Surat yang dipersoalkan itu tidak menjelaskan peruntukan-peruntukan Akta Syarikat 1965 ('Akta') yang membolehkan pelikuidasi bertindak atas surat yang dipersoalkan. Selanjutnya, perkara-perkara yang
- F dibangkitkan di dalam surat yang dipersoalkan telah diuruskan oleh mahkamah atau pelikuidasi-pelikuidasi di dalam laporan-laporan mereka. Walau bagaimanapun, jika pelikuidasi-pelikuidasi bersetuju dengan aduan yang dibangkitkan oleh defendan mereka perlu memohon kepada mahkamah di bawah Akta tersebut dan tidak membuat perintah sehingga satu keputusan atau penemuan dibuat. Mahkamah ini oleh itu mendapati bahawa surat yang dipersoalkan bukanlah sebahagian
- G prosiding separa kehakiman yang menarik keistimewaan mutlak (lihat perenggan 7 & 9).
- H (3) Tidak ada peruntukan di bawah Akta untuk defendan menulis surat yang dipersoalkan dan kemudian menuntut keistimewaan bersyarat kerana ia tidak wujud. Selanjutnya, defendan tidak ada kewajipan dari segi moral untuk membawa perkara-perkara kepada perhatian
- I pelikuidasi-pelikuidasi melalui surat yang dipersoalkan tersebut (lihat perenggan 9).
- (4) Selepas mengambil kira sifat fitnah dan sengatan surat yang dipersoalkan, yang pada asasnya dikurangkan dengan kegagalan defendan dalam kesemua permohonannya terhadap pelikuidasi dan syarikat, mahkamah ini mengawardkan plaintif ganti rugi pampasan am sebanyak

RM70,000, ganti rugi am sebanyak RM50,000 dan ganti rugi keterlaluan sebanyak RM20,000 dengan kos (lihat perenggan 11–12).]

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Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 484–645.

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Cases referred to

Abdul Khalid @ Khalid Jafri bin Bakar Shah v Party Islam Se Malaysia & Ors [2002] 1 MLJ 160; [2001] 4 CLJ 15, HC (refd)

Albert Chew v Hong Leong Finance Bhd [2001] 4 MLJ 497, HC (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

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D v Kong Sim Guan [2003] 3 SLR 146, HC (refd)

JB Jeyaretnam v Goh Chok Tong [1985] 1 MLJ 334, CA (refd)

Jones v Skelton [1963] 3 All ER 952, PC (refd)

Theaker v Richardson [1962] 1 WLR 151, CA (refd)

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Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter [1992] 2 MLJ 689, SC (refd)

Tien Ik Enterprises Sdn Bhd v Woodsville Sdn Bhd [1995] 1 MLJ 769, SC (refd)

Trapp v Mackie [1979] 1 WLR 377, HL (refd)

Tun Datuk Patinggi Hj Abdul Rahman v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, CA (refd)

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Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors [2009] 3 MLJ 191, CA (refd)

Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors and other applications [1994] 3 MLJ 89, HC (refd)

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Legislation referred to

Companies Act 1965 ss 227, 234, 235, 249, 250, 277(2)

M Nagarajah (Sudesh Singh and Nurul Huda Padulli with him) (Shook Lin & Bok) for the plaintiff.

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Lim Kian Leong (Ong Chee Kwan and Racheal Tan with him) (Lee Ong & Kandiah) for the defendant.

Prasad Abraham JC:

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[1] This is an action for defamation arising out of a letter written by the defendant concerning the plaintiff to a representative of a liquidator. The court after a trial of the matter concluded the letter was libelous when it delivered its judgment on 21 February 2011. The defendant has since appealed against the decision and I append below my reasons for so finding.

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[2] The plaintiff and the defendant are brothers and are part of one of the notable families in Malaysia the Kuok family and the root of bitterness between

A these two brother stems from intense rivalry and mistrust amongst family members in the corporate myriad of family companies. This exploded into a series of litigation that tread the path for each of the cases from the High Court to the Supreme Court and the Court of Appeal. Whilst the materials and allegations in each of these cases reminds one of the scripts that miniseries on the television were made of, it kept our courts busy for close to approximately two decades or so. While our law journals and the legal fraternity have been enriched by the points of law these cases stood authority for, they left on indelible mark of bitterness and mistrust between the plaintiff and the defendant which has spilled over to the present dispute before me.

C [3] Before I proceed further let me set out briefly the background of the history of this case antecedent to the dispute at hand. The background facts are as set out below:

D BACKGROUND FACTS

[4] The defendant ceased to be a director of the following companies since 1989:

- E** (a) Tien Ik Sdn Bhd;
(b) Tien Ik Enterprises Sdn Bhd; and
(c) Tien Ik Credit Sdn Bhd.

F [5] The Supreme Court affirmed a declaration that the defendant be removed from office as Director of Tien Ik Enterprises Sdn Bhd and Tien Ik Credit Sdn Bhd when the notice for removal was sent to the defendant on 23 march 1989. The judgment of the Supreme Court is reported in [1992] 2 MLJ 689.

G [6] In 1990, Woodsville Sdn Bhd ('Woodsville'), the nominee company of the defendant, as a contributory, petitioned on just and equitable grounds for the winding up of:

- H** (a) Tien Ik Sdn Bhd;
(b) Tien Ik Enterprises Sdn Bhd;
(c) Tien Ik Credit Sdn Bhd; and

I (d) Giltspur Holdings Sdn Bhd
(the said Companies').

[7] Woodsville Sdn Bhd filed winding up petitions in the Kuala Lumpur High Court for each of the said companies to be wound up on just and

equitable grounds and the winding up petitions were subsequently ordered to be consolidated ('the said winding up petitions'). A

[8] The plaintiff and the other contributories opposed the said winding up petitions. B

[9] On 9 June 1996, the High Court ordered that the said companies be wound up and that, inter alia, Mr Gong Wee Ning and Mr Mustapha Mohamed be appointed as liquidators of said companies ('the liquidators'). C

[10] The judgment of Her Ladyship Dato' Siti Norma J is reported at [1994] 3 MLJ 89;

[11] The plaintiff and the other contributories then appealed to the then Supreme Court against the winding up order of 9 June 1994 in Supreme Court Civil Appeal No 02-317 of 1994. On 25 March 1995, the Supreme Court dismissed the appeal. The judgment of the Supreme Court is reported at [1995] 1 MLJ 769. D

[12] Not long after the liquidators took office, the defendant wrote the said letter to Mr John Verghis, who was the agent of the liquidators. E

[13] Subsequent to the appointment of the liquidators, the defendant sought to remove the liquidators from their office. The judgment of the High court dismissing the defendant's application for removal is reported in [2001] MLJ 265. The defendant's appeal to the Court of Appeal was also dismissed on 12 August 2010. F

[14] the defendant had similarly obtained an ex parte order for leave to commence committal proceedings against the liquidator and the plaintiff. The ex parte order was set aside on 24 July 2003. The defendant's appeal to the Court of Appeal against the setting aside was dismissed on 26 February 2009. The judgment of the Court of Appeal is reported at [2009] 3 MLJ 191. G

[15] After the appointment of the liquidator for the Tien Ik Group, the defendant wrote a letter to the agent and/or representative of the liquidator Mr John Verghis dated 12 May 1995 ('the impugned letter') and the letter itself has been set out in appendix A to the statement of claim, (see p 31 of bundle A). The plaintiff claims the impugned letter is defamatory in nature and all the ingredients in law to sustain that plea have been met. The defendant in its statement of defence contend that the impugned letter is not defamatory as it is absolutely privileged because it was written in the course of judicial proceedings. It also attracts qualified privileged for as a contributory and/or H I

A shareholder to write about the said companies and point out the irregularities in the management of the companies in which the plaintiff exercised executive powers, he was under a legal, social, and or moral duty so to do.

B [16] Let me turn to the impugned letter first. One of the first elements of defamation would be to establish whether the impugned letter makes reference to the plaintiff. In my view it patently does as one has to only look at the first two paragraphs of the letter alone and I quote:

C irregularities known. Net exhaustive include:

(1) In most case, the companies accounts were late without any just cause or excuse resulting in fines and penalties paid to the Registry of Companies and to the Inland Revenue Department Companies (by exclusion the shareholders) suffered loss and damage.

D (2) Computer. Jenny Low and DK both Chartered Accountants, were at all material times directors of the companies in the group, and in particular directors of TIE S/B group. About 1986, Jenny Low sold a second hand computer to DK and the latter 'leased' it to TIE S/B using David Kuok & Co to issue monthly debit notes to the lessee. At the end of the lease, DK took back the computer and claimed that it belonged to him.

E and thereafter the whole body of the impugned letter it is abundantly clear, the impugned letter refers to the plaintiff. As to the second ingredient as to whether there was publication of the impugned letter, I find there clearly was. The letter was written in the defendant's handwriting in an open letter not even marked private and confidential and the defendant by his own evidence says he handed this letter by hand to Mr John Verghis office. The court can draw a reasonable inference that because of the method of communication used by the defendant in this case, the impugned letter would have been published to third parties and no proof that the impugned letter was actually seen or read by third parties is necessary as in this particular case (see *Theaker v Richardson* [1962] 1 WL 151.

F [17] As to whether the impugned letter read as a whole is defamatory, there is no universal test to determine whether or not any given words are defamatory or not, but if they tend to lower the plaintiff in the estimation of right thinking men in general, then the court could find the impugned letter is defamatory in nature, if the impugned letter imputes to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity, this would be a formulation of a defamatory statement (see the case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at p 374 the judgment of His Lordship J Gopal Sri Ram as he then was 'it cannot, I think, be doubted that the first task of a court in an action for defamation is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is

beyond argument that this is in essence a question of law that turns upon the construction of the words published. As Lord Morris put it in *Jones v Skelton* [1963] 3 All ER 952 at p 958:

The ordinary and natural meaning of words may be either the literal meaning or it may be an implies or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

[18] In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory (see *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334) Richard Malanjum J, in an admirable judgment in *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, collected and reviewed the relevant authorities upon this branch of the subject and I would, with respect, expressly approve the approach adopted by him. Looking at the language used in the impugned letter, it is clear the defendant alleged the plaintiff had abused his powers while exercising executive powers over the group of companies and went on to set out in lucid details, each of his allegations with reference to various sections of the Companies Act 1965. This was after the liquidator had been appointed by the winding up court and was tasked under the law to investigate the affairs of these companies. Further the liquidator had inked their reports and the court as well dealt with each of the complaints and found no basis for the same. I therefore categorically found the impugned letter on the face of it is defamatory.

[19] I turn to the defences raised by the defendant in his statement of defence. The defendant contends that the impugned letter is absolutely privileged as it was written as part of judicial proceedings ie winding up proceedings and absolute privilege should operate as a defence. In my view once a winding up order has been made as in this case, liquidation proceedings have commenced and it is the Companies Act and its various provisions of the Companies Act 1965 that set out specific provisions as to liquidation (see the book of *Winding-up of Companies Cases and Commentaries* by KV Padmanabha Rau at p 345 in Chapter 9).

- A [20] The test to determine whether a plea of absolute privilege would lie is to consider whether when the impugned letter was written to John Verghis as a representative and or agent of the liquidator, it was written in a quasi judicial capacity, the factors to be considered are (a) under what authority the tribunal acts (b) the nature of the question into which it is its duty to inquire (c) the procedure adopted by it in carrying out the inquiry and (d) the legal consequences of the conclusions reached by the tribunal as a result of the inquiry (see *D v Kong Sim Guan* [2003] 3 SLR at p 146 and *Trapp v Mackie* [1979] 1 WLR 377 at p 379).
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- C [21] When the defendant wrote the impugned letter to John Verghis, whilst purporting to act as a shareholder the shareholder in question was Woodsville Sdn Bhd, a company the defendant controls. Furthermore in communications which is alleged to be quasi judicial in nature should have been addressed to the liquidators themselves. Even if John Verghis was authorised by the liquidators to receive the impugned letter, it must be clearly stated that it is received on the liquidator's behalf (see s 227 of the Companies Act 1965). The impugned letter does not set out the provision of the Companies Act 1965 where the liquidators can act on the impugned letter (if at all). Further, the matters raised in the impugned letter have been dealt with by the court or the liquidators in their reports and even if the liquidator were to agree with the complaints, the liquidators would have to move the court under the Companies Act 1965 and not make orders after a decision or finding is made. I am of the view that the impugned letter addressed to John Verghis is not part of a quasi judicial proceedings that attracts absolute privilege. The defendant also pleads qualified privilege and absence of malice. The defendant contends that as a shareholder, the defendant has a legal, social or moral duty to write the impugned letter about the plaintiff to the representative of the liquidator so for eg a complaint on alleged misconduct on part of an advocate and solicitor to the Bar Council was held to attract qualified privilege (see *Albert Chew v Hong Leong Finance Bhd* [2001] 4 MLJ 497).
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- H [22] A careful scrutiny of the relevant provisions of the Companies Act provide the procedure for the liquidators investigative powers to kick in. Firstly the statement of affairs must be filed by the directors of the group of companies. Thereafter, the liquidator will prepare a report having concluded their investigations. *If the liquidators do not take any action, then and only then* can the defendant move the court to look into the conduct of the liquidator (see ss 234, 235, 249–250 and 277(2) of the Companies Act 1965). *There is no provision under the Companies Act* for the defendant to have written the impugned letter and then claim qualified privileged as none exists. I make reference to *McPherson's Law of Company Liquidation* (4th Ed), at pp 623–625 and I quote:
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INVESTIGATIONS

General

A substantial part of the role of liquidator involves investigative work. The liquidator must locate the recover assets, ascertain the circumstances that precipitated the liquidation and, where necessary, initiate prosecutions. To this end the liquidator will usually conduct informal interviews of company employees and those officers who are cooperative, speak to creditors of the company and examine the company's books, records, cash receipts, bank accounts, dealings with others and disposal of assets. Other officers and people connected with the company may be interviewed, but they may not be. cooperative and, hence, other measures may need to be embraced.

The liquidator will carefully examine the report made out by the directors and the secretary pursuant to s 475. In compulsory liquidations, unless there is reasonable excuse, this report must be filed with the liquidator within 14 days of the winding-up order. The liquidator is required to file copies of the report with the ASIC and the court within seven days of receiving it.

The extent of the liquidator's investigations will depend on the size of the company, the nature of the company's affairs and assets, the attitude of the officers and the circumstances surrounding the liquidation.

In situations where officers of the company have failed to comply with the requirement that they submit a s 475 report or failed to produce the company's books and records when requested, the liquidator may seek the assistance of the ASIC. The ASIC may undertake investigations, followed by prosecutions.

The investigative role of the liquidator is recognised by the Corporations Law. An official liquidator is obliged by s 476 to lodge a preliminary report with the ASIC providing details of the company, it must specify:

- The amount of capital issued, subscribed and paid up;
- The estimated amounts of assets and liabilities;
- The causes of the company's failure;
- Whether further inquiry is desirable.

The report must be made within two months of receiving the directors report as to the company's affairs under s 475. No such report must be filed in a voluntary winding up.

In addition to the s 476 report, in any form of liquidation a report under s 533 must be lodged if:

- Offences have been committed;
- Officers, promoters or managers are guilty of improper behaviour; or
- The company is unable to pay unsecured creditors more than 50 cents in the dollar.

In compulsory liquidations liquidators frequently satisfy s 476 and 533 in the one report.

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- A** The liquidator must indicate in a s 533 report whether he or she will apply for the examination of persons connected with the company.
Often the liquidator will have to be judicious in engaging in investigations as there may not be sufficient funds to support detailed investigations unless the creditors support such endeavours.

B Liquidators Reports

Statutory provisions

- C** The fruit of a liquidator's investigations will, in part, be found in reports that must be filed with the ASIC,

- D** A liquidator in compulsory winding up is, by s 476, placed under an absolute duty of submitting to the court a preliminary report, giving details of the capital of the company and the causes of its failure and indicating whether in the liquidators' opinion further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the failure of its business. The s 476 report must be filed with the ASIC within two months (or such longer period as allowed by the ASIC) of receiving the s 475 report from the directors. In addition to filing the s 676 report, a liquidator in either form of winding up is required to lodge with the ASIC a report stating that in the liquidator's opinion it appears that a past or present officer or a member of the company may have been guilty of an offence or that persons who have taken part in the company's affairs may have misappropriated money or property of the company or may have been guilty of negligence; default, breach of duty or breach of trust in relation to the company or that the company may be unable to pay its unsecured creditors more than 50 cents in the dollar. Further reports may be lodged, in which the liquidator may specify any other matter that should be brought to the notice of the ASIC. Whether such a report should be made is left to the discretion of the liquidator, but the discretion has been described as capable of being exercised in only one way if, after consideration of the facts, the liquidator arrives at a judicial conclusion in her or his own mind that there are facts that justify the making of the report

- E** In one of the leading cases, *Ex parte Barnes*, the House of Lords held that the submission of a report by the liquidator was a condition precedent to the making of an order for public examination and that the necessary report for this purpose was the further report referred to in s 533 and not the preliminary report required by s 476 to be submitted in every winding up. In their present form, neither s 596A nor s 596B refer or allude to any report by the liquidator. Nevertheless, it may still be desirable for the court to be furnished with a proper report so that it can decide whether a public examination should be ordered. In the absence of such a report, the court would find it more difficult to give effective directions as to the scope and procedure of the public-examination pursuant to s 596F(1).

- F** The liquidator enjoys qualified privilege in relation to all statements made in the reports that must be prepared and filed. The s 533 report cannot be inspected by members of the public at the offices of the ASIC.

G Nature and contents of report

The s 533 report should not contain broad statements, but rather should make reference to the facts, supporting the liquidator's allegations. The nature of the actual contents of the report was of greater significance under previous legislation, where one

of the grounds on which an order for public examination could be sought was that the proposed examinee had been or many have been guilty of fraud in relation to the company. The report had to raise a prima facie case that fraud had been committed and that certain specified persons were involved.

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[23] As to whether the defendant had a moral duty to bring matters to the attention of the liquidators by way of the impugned letter because he felt there was delay or inaction on part of the liquidators, I find the action of the defendant is ill founded in law. The defendant could have moved the winding up court which exercises control of the liquidators. In fact, the defendant attempted to remove the liquidators by seeking a court order but failed. The matters complained of have been dealt with in the liquidators reports and in the string of court decisions referred to earlier. The defendant however persisted in writing the impugned letter. The root of bitterness having taken hold caused the defendant to write the impugned letter irrespective. Failure to allow the liquidators to carry out their duties under the Companies Act 1965 are sufficient in my view to establish indifference or recklessness as to the truth of the contents of the impugned letter which can constitute malice and I so hold. The defendant when in the witness box, whilst forthright in his testimony, but the scars of prolonged legal battles and complete breakdown of trust and bitterness were apparent which clearly clouded his judgment bearing in mind the defendant is an advocate and solicitor of many years standing. I therefore dismissed the defences of the defendant and found for the plaintiff, in assessing the damages to be awarded to the plaintiff, I am reminded that compensatory damages are awarded to compensate not to punish. The three purposes of compensatory damages are consolation for the personal distress and hereof caused to the plaintiff by the impugned letter (in solatium), compensation to repair the harm done to the plaintiff's personal and business reputation (which I find irrelevant and find so in this case) and vindication of the plaintiff's reputation. The court took into account the nature of the defamation and the sting of the impugned letter which had in the main been mitigated by the failure of the defendant in all his applications against the liquidator and the other complaints, (see *Abdul Khalid @ Khalid Jafri bin Bakar Shah v Party Islam SeMalaysia & Ors* [2002] 1 MLJ 160; [2001] 4 CLJ at p 15)

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[24] In the light of the above I awarded general compensatory damages in the sum of RM70,000; RM50,000 general damages RM20,000 for aggravated damages and costs.

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Plaintiff's claim allowed with damages and costs.

Reported by Kohila Nesan

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